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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 743

HERBERT BROWNELL, JR.,
ATTORNEY GENERAL OF THE UNITED STATES, *Petitioner*

v.

TOM WE SHUNG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals is reported at 227 F. 2d 40 (R. 21-22), and the findings of the District Court are unreported (R. 19).

Jurisdiction

The judgment of the Court of Appeals was entered on October 13, 1955. Chief Justice Warren extended the time for filing the instant petition until March 10, 1956. The

petition was filed on March 8, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether a declaratory judgment action is maintainable under the Immigration and Nationality Act of 1952 to review a status question in an exclusion proceeding, i.e., the issue whether respondent is the alien son of a World War II veteran American father.

Statutes

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009, provides in part as follows:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> "(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> "(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law."

Section 12 of the Administrative Procedure Act (60 Stat. 244, 5 U.S.C. 1011) provides in part:

> "No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly."

Section 236(c) of the Immigration and Nationality Act of 1952, 66 Stat. 200, 8 U.S.C. 1226(c), provides in pertinent part:

> ". . . in every case where an alien is excluded from admission into the United States, under this Act, or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General."

Section 360(c) of the Immigration and Nationality Act of 1952, 66 Stat. 273, 8 U.S.C. 1503 provides in part:

> "A person *who has been issued a certificate of identity* under the provisions of subsection (b) of this section, and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise" (Italics supplied).

Statement

Respondent's complaint alleges that he is the blood son of Tom Wing, a World War II veteran and citizen of

the United States and that he was admissible to the United States on November 28, 1947, when he arrived at San Francisco and sought entry as the alien son of a veteran pursuant to 8 U.S.C. 232 (R. 15). A three man board of special inquiry consisting of two immigrant inspectors and a clerk-stenographer voted on February 24, 1949, to exclude respondent. One of these inspectors and the clerk-stenographer were not present during the first day of hearing when respondent testified. On appeal to the Board of Immigration Appeals the order of exclusion was affirmed. Respondent seeks a judgment declaring that he is the son of Tom Wing. He also seeks a judgment declaring that his hearing before the board of special inquiry was unfair, *inter alia*, because of the composition of the board of special inquiry, because those who heard his testimony were not the same individuals who rendered the decision, and because the order of exclusion was not supported by substantial evidence (R. 15-16).

A previous declaratory judgment action filed on June 10, 1950, was dismissed by order of the Supreme Court by a vote of 6 to 3 (346 U.S. 906) for lack of jurisdiction upon the authority of *Heikkila* v. *Barber*, 345 U.S. 229 (1953). Thereafter on December 15, 1953, the present action was filed. The District Court dismissed the complaint, ruling that it was without jurisdiction to review an order of exclusion in proceedings other than in a habeas corpus action (R. 19). No written opinion was filed.

The Court of Appeals reversed, on October 13, 1955, remanding the case for trial on the merits (R. 21-23). The reasoning of the Court of Appeals, set forth in *Esterez* v. *Brownell*, 227 F. 2d 38 (C.A. D.C., 1955), decided the same day, states:

> "If appellant were attacking a deportation order instead of an exclusion order, his right to the review

he seeks would be clear. *Shaughnessy* v. *Pedreiro*, 349 U.S. 48. We think the principle of that case extends to this one.[3]

[3] Although the exclusion case of *Tom We Shung* v. *Brownell*, 346 U.S. 906, involved the 1917 Act, and the present case involves the 1952 Act, it is perhaps significant that in *Tom We Shung* the Supreme Court relied solely on *Heikkila*, a deportation case."

More than eight years have thus elapsed since respondent's arrival and more than five since the administrative decision herein, and respondent has yet to secure a binding judicial decision on the merits of his contentions.

Argument

1. *Applicability of Shaughnessy* v. *Pedreiro*. In *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955) this Court observed that Section 12 of the Administrative Procedure Act required express language in subsequent legislation to override Section 10 of that Act. It was said:

> "In the subsequent 1952 Immigration and Nationality Act there is no language which 'expressly' supersedes or modifies the expanded right of review granted by §10 of the Administrative Procedure Act. But the 1952 Immigration Act does provide, as did the 1917 Act, that deportation orders of the Attorney General shall be 'final.' The Government contends that we should read this as expressing a congressional purpose to give the word 'final' in the 1952 Act precisely the same meaning *Heikkila* gave 'final' in the 1917 Act and thereby continue to deprive deportees of all right of judicial review except by habeas corpus. We cannot accept this contention.
>
> "Such a restrictive construction of the finality provision of the present Immigration Act would run counter to §10 and §12 of the Administrative Pro-

cedure Act. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes like the 1952 Immigration Act. And as the Court said in the *Heikkila* case, the Procedure Act is to me given a 'hospitable' interpretation. In that case the Court also referred to ambiguity in the provision making deportation orders of the Attorney General 'final.' It is more in harmony with the generous review provisions of the Administrative Procedure Act to construe the ambiguous word 'final' in the 1952 Immigration Act as referring to finality in administrative procedure rather than as cutting off right of judicial review in whole or in part. And it would certainly not be in keeping with either of these Acts to require a person ordered deported to go to jail in order to obtain review by a court."

The language of the Court relative to the requirement of express subsequent language superseding Section 10 of the Administrative Procedure Act is equally applicable to review of exclusion orders. There is no express language in the 1952 Act precluding judicial review of exclusion orders of the type entered herein. That the finality provisions of the 1952 Act in regard to exclusion apply likewise to administrative finality is also clear. It therefore follows that the Court below adhered to the principles enunciated by this Court in the *Pedreiro* case and that there is no need for further review by the Supreme Court.

2. *Applicability of Rasmussen* v. *Brownell.* In *Rasmussen* v. *Brownell*, 350 U.S. 806 (1955), this Court ruled that a status question was reviewable in a declaratory judgment action. In the instant case a status question is presented, that of respondent's relationship to a citizen-veteran. This issue arises under the War Brides Act, 8 U.S.C. 232, a statute which has expired. Relatively few

status questions arise under the general exclusion statute now in force [8 U.S.C. 1226(c)]. Accordingly, the narrow issue presented herein is not of widespread importance. In any event, declaratory judgment is appropriate under the *Rasmussen* doctrine.

3. *Finality of Exclusion Orders.* Petitioner seeks to distinguish exclusion orders upon the ground that under 8 U.S.C. 1226(c) a special inquiry officer may enter a final exclusion order if it is not reversed upon administrative appeal. This is exactly the situation with reference to deportation orders, except that it is accomplished by regulations rather than by express language of the statute. 8 C.F.R. 242.61(c). It is therefore obvious that the distinction suggested by petitioner has no real significance. The Government recognized this in its brief in this Court in *Brownell* v. *Rubinstein*, 346 U.S. 929 (1954), where it stated at pages 39-40:

> "The decision below raises a particularly serious problem in that it suggests, what we do not concede, that orders of the Attorney General excluding aliens from the United States, as well as deportation orders could be challenged in the courts in proceedings other than habeas corpus. As this Court apparently held in *Tom We Shung* v. *Brownell*, *supra*, the rationale of *Heikkila* v. *Barber*, *supra*, compelled the conclusion that under the provision for finality in exclusion cases in Section 17 of the Immigration Act of 1917 (8 U.S.C. 153), Federal Courts lacked jurisdiction to examine exclusion orders except in habeas corpus proceedings. Section 236(c) of the 1952 Act provides, in language taken substantially verbatim from the 1917 Act, that 'where an alien is excluded from admission into the United States, under this Act or any other law or treaty now existing or hereafter made,

> the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General.' In *Tom We Shung*, this Court apparently found no distinction between the provisions for finality in the deportation and exclusion provisions of the 1917 Act. The same finality provisions were reenacted practically verbatim in Sections 236(c) and 242(b) of the 1952 Act. Obviously, it could be argued that they have and were intended to have the same consequences as to the availability of judicial review."

In *Shaughnessy* v. *Pedreiro*, *supra*, the Government again repeated in its brief (pp. 35-36):

> ". . . Section 236(c) (8 U.S.C. 1226(c)) merely provides like the former exclusion statute which was before this Court in *Tom We Shung* v. *Brownell*, 346 U.S. 906, that the administrative decision shall be 'final.'"

We submit that the newly asserted meaning found by petitioner in the finality clause of the exclusion provisions is unwarranted. On the contrary, the Government's previous analysis was correct.

4. *Constitutional Considerations.* Whether an excluded alien or a deported alien is entitled to judicial review through habeas corpus or declaratory judgment is not dependent upon constitutional rights of the alien. Suffice it is to say that some excluded aliens are protected by the Constitution. *Chew* v. *Colding*, 344 U.S. 590 (1953). The problem here presented is one of statutory construction, and not one of constitutional law.

5. *Scope of judicial review.* Petitioner argues that the scope of review would be enlarged if exclusion orders could be reviewed in declaratory judgment actions. Of course, if the statutory language grants such review, such argu-

ment carries no weight. But more important is the fact that scope of review is not dependent on the form of action. As the Attorney General stated (prior to the *Pedreiro* decision), referring to *Heikkila* v. *Barber*, 345 U.S. 229 (1953):

> "Regarding the scope of review, it is doubtful whether the scope is now any different in habeas corpus from that which is accorded to the orders of other agencies under Section 10 of the Administrative Procedure Act." *Report of the Judicial Conference of the United States* (September 1953, p. 43).

The decision of immigration officials excluding an alien (except where based upon confidential information in security cases) must be after a fair hearing and in conformity with the statutory grounds of exclusion. *Geigow* v. *Uhl*, 239 U.S. 3 (1915); *Kwock Jan Fat* v. *White*, 253 U.S. 454 (1920); *Chin Yow* v. *United States*, 208 U.S. 8 (1908). In addition, the exclusion order requires adequate or substantial evidence in the record to support it. *O'Connell ex rel. Kwong Hai Chew* v. *Ward*, 126 F. 2d 615 (C.A. 1, 1942); *Chryssikos* v. *Commissioner of Immigration*, 3 F. 2d 372 (C.A. 2, 1924). Accordingly, it is submitted that the scope of review will not be affected by the decision below.

6. *Section 360 of the 1952 Immigration and Nationality Act (8 U.S.C. 1503).* Petitioner states that the statutory provisions relating to the exclusion of aliens generally must be read in the light of Section 360 of the 1952 Act (Pet. 15). Quite the contrary were the statements of the Government in its *Rubinstein* and *Pedreiro* briefs in this Court. In the *Rubinstein* brief the Government said (pp. 38-39):

> "Under Section 503 of the Nationality Act of 1940, 54 Stat. 1171, persons claiming to be citizens or na-

tionals of the United States, regardless of whether such persons were within or without the United States, were given a special declaratory judgment procedure to obtain a judicial determination of their claims. The purpose of Section 360 of the 1952 Act is to make that judicial procedure unavailable to persons outside the United States and to provide for the determination of the claims of limited groups of such persons by the Attorney General in administrative exclusion proceedings. * * * *It has nothing to do with ordinary exclusion cases as to which Section 236(c) provides, like the former exclusion statute which was before this Court in Tom We Shung v. Brownell, decided per curiam December 7, 1953, that the administrative decision shall be final.* (Italics supplied).

In the *Pedreiro* brief (p. 35) the Government repeated with reference to Section 360:

> "It has nothing to do with ordinary exclusion cases as to which Section 236(c) (8 U.S.C. 1226 (c)) merely provides, like the former exclusion statute [* * *] that the administrative decision shall be 'final.'"

If anything, Section 360 supports the judgment below. Congress has in the limited cases therein mentioned specifically directed that habeas corpus proceedings shall be the exclusive remedy. No such specific direction is to be found with reference to the ordinary exclusion case under Section 236(c). The fact that Congress said clearly what it meant in Section 360(c) with regard to those seeking admission with certificates of identity (a practice which lent itself to fraud and other abuses) is strong evidence that it did not mean what it did not specifically say in Section 236(c) with regard to exclusion cases generally.

Finally it should be observed that citizenship claimants

outside the United States have merely been deprived of the special declaratory judgment procedure of 8 U.S.C. 903. They may still bring a declaratory judgment action under the general declaratory judgment act. *Ngow* v. *Dulles*, 122 F. Supp. 709 (D.C. Dist of Col. 1953). The alleged disparity between citizenship claimants and excluded aliens is therefore nonexistant.

7. *Legislative History.* Petitioner relies upon the same legislative history which was unsuccessfully invoked in deportation cases. *Shaughnessy* v. *Pedreiro, supra.* Congress made no distinction between general exclusion cases and deportation cases for the purposes of judicial review. Isolated statements of members of Congress must necessarily yield to the language of the Act and the final committee reports. The Conference Report, *H. Rep. 2096*, 82nd Congress, 2nd Sess., with reference to the 1952 Immigration and Nationality Act states;

> 'Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and protection of economic and social welfare of the citizens of this country, remain within the framework and the pattern of the Administrative Procedure Act. *The safeguard of judicial procedure is afforded the alien in both exclusion and deportation proceedings.*" (Italics supplied).

Thus it will be seen that Congress contemplated the same form of judicial review for deportation and general exclusion cases.

8. *Practical Considerations.* Petitioner relies upon practical considerations (Pet. 19) which are hardly determinative of the issue presented herein.

However, it should be noted that practical reasons sup-

port the judgment below. *First*, there is no reason why here, as in deportation cases, an alien should be in jail in order to seek court review. *Secondly*, court review will be denied entirely to many aliens if habeas corpus is to be the exclusive method of review. Excluded aliens fall into three categories—(a) those who are detained representing an extremely small percentage, (b) those on parole like the respondent, (c) those stopped at our land borders and refused admittance. The last category represents a large number of aliens who are never detained and who will be denied court review if resort to habeas corpus is necessary. *Thirdly*, those on parole like respondent who entered the United States at San Francisco, do not remain at the port of entry. Respondent now lives in Philadelphia. Petitioner would have him pack up, wind up his affairs, and travel across the United States to detention in San Francisco in order to secure court review. If respondent is successful in judicial proceedings or if deportation may not be effectuated to Communist China, then respondent would be permitted to recross the United States to Philadelphia and restablish himself. The petitioner's view would make litigation expensive, inconvenient and burdensome to the alien. In addition, for the alien paroled for years as in the instant case, litigation would be precluded until the day of detention. The Immigration Service notifies an alien to report for detention a day or two days prior to deportation. Confined to habeas corpus, the paroled alien must hazard the risk of securing a court to sign a writ of habeas corpus during the day of his detention and before his jailer ships him overseas. Judicial criticism is not lacking in those cases where our immigration authorities attempted to spirit aliens away while a writ of habeas corpus was being sought. See *U.S. ex rel. Circella* v. *Neely*, 115 F. Supp. 615 (D.C.N.D. Ill. 1953),

affirmed 216 F. 2d 33 (C.A. 7, 1954). *Finally*, it should be noted that declaratory judgment actions may be handled promptly. Under Rule 57 of the Rules of Civil Procedure such actions may be advanced on the calendar.

Conclusion

The decision below correctly follows this Court's decision in *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955), and is in conformity with *Rasmussen* v. *Brownell*, 350 U.S. 806 (1955). Pertinent considerations of statutory language, legislative history and practical effect support the view that the holding below should remain undisturbed. In the light of the *Rasmussen* case, the narrow issue is presented as to whether declaratory judgment relief is appropriate in a case presenting a status question—an issue which does not have extensive application under the general exclusion provisions of the 1952 Immigration and Nationality Act. In addition, in the light of the *Pedreiro* case, no basis has been presented indicating the necessity for further review by this Court of the decision below. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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